THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BREONA HARRISON,	)	OEA Matter No. 2401-0038-11
Employee	)	
v.	)	Date of Issuance: December 10, 2014
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Breona Harrison ("Employee") worked as a Placement Specialist with D.C. Public Schools ("Agency"). On October 22, 2010, Agency issued a notice of final decision removing Employee from her position effective November 21, 2010. The notice provided that Employee was removed due to a reduction-in-force ("RIF").[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 10, 2010. She argued that the RIF was procedurally and substantively flawed. She contended that the RIF was a pre-text and that the work she performed was now being done by other individuals. Accordingly, Employee requested that the RIF be reversed and that she be reinstated with back pay and benefits.[2]

In its response to Employee's Petition for Appeal, Agency explained that the Non-Public

[1] *Petition for Appeal,* Attachment #1 (December 10, 2010).
[2] *Id.* at 6.

Unit ("NPU") of the Office of Special Education was the competitive area for the RIF, and all non-management positions within the NPU were eliminated to reduce costs. Placement Specialist was one of the positions within NPU that was eliminated. Agency contended that because all of the positions within the competitive level were eliminated, then one round of lateral competition was not required. It also explained that it provided Employee with the required thirty-day notice before removing her. Therefore, it requested that Employee's appeal be dismissed.[3]

Before issuing her final decision in this matter, the OEA Administrative Judge ("AJ") ordered the parties to issue briefs on the RIF action. Employee's brief was filed on October 31, 2012. In it, she argued that in accordance with D.C. Official Code § 1-624.08, each agency head is authorized to identify positions to be abolished in a RIF. However, Employee contended that Michelle Rhee was not the Agency head on October 22, 2010, when her notice was issued. She alleged that Michelle Rhee's resignation was issued on October 13, 2010. Therefore, the RIF was improper and failed to comply with D.C. Official Code § 1-624.08. Additionally, Employee raised several claims regarding the budgetary necessity of the RIF action.[4]

On October 12, 2012, Agency filed its brief which provided that there were ten Placement Specialist positions which were all eliminated during the RIF. Therefore, one round of lateral competition was not applicable. Additionally, it argued that Employee was given thirty days' notice.[5] On March 28, 2013, Agency filed a subsequent brief arguing that Michelle Rhee was specifically authorized to conduct the RIF. It contended that Ms. Rhee performed her role as Chancellor until her effective resignation date of November 2, 2010. Employee received her RIF notice on October 22, 2010, before Chancellor Rhee's resignation. Agency explained that

[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* p. 2-5 (January 20, 2011).
[4] *Employee's Brief in Support of Appeal* (October 31, 2012).
[5] *District of Columbia Public Schools' Brief* (October 12, 2012).

because Michelle Rhee was the head of Agency, the RIF was properly executed.[6]

The AJ issued her Initial Decision on this matter on May 29, 2013. She held that in accordance with D.C. Official Code § 1-624.08, Agency was required to provide one round of lateral competition and thirty days' notice. The AJ found that after reviewing Agency's evidence, it was adequately proven that Employee's entire competitive level was eliminated. As a result, she reasoned that there was no need for one round of lateral competition. Furthermore, the AJ ruled that in accordance with D.C. Official Code § 1-624.08(e), Employee was entitled to thirty days' notice. She found that Agency provided the required notice. As for Employee's budgetary allegations, the AJ held that OEA lacked authority to determine whether the RIF was the result of bona fide budget constraints. Moreover, she provided that Employee offered documents that were more editorial in nature and that none of the documents presented corroborated that there was a lack of budgetary constraints. Accordingly, Agency's RIF action was upheld.[7]

On September 4, 2013, Employee filed a Petition for Review with the OEA Board. Employee presents the same arguments that were raised before the AJ. Specifically, she asserts that a hearing should have been held to address who was the Agency head at the time of her RIF. Similarly, she submits that a hearing should have taken place to give proper consideration to the competitive area and competitive level in this case. Finally, she argues that a hearing should have occurred to determine if there was a budget crisis to justify the RIF.[8]

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[6] *District of Columbia Public Schools' Brief* (March 28, 2013).
[7] *Initial Decision*, p. 8-10 (May 29, 2013). As for Employee's argument about other employees retaining their positions, the AJ ruled that just because there are employees who remained within the NPU does not mean they should have been subjected to the RIF because NPU was the competitive area of the RIF, not the competitive level. Furthermore, she held that the claims regarding the collective bargaining agreement, discrimination, privatization, and grievances were all outside the scope of OEA's jurisdiction. Finally, the AJ ruled that Employee was not guaranteed a position with Agency under its Priority Re-employment program.
[8] *Appeal of Ruling Dates July 26, 2013* (September 4, 2013).

Evidentiary Hearing

It is Employee's position that all of her issues could have been addressed had the AJ conducted an evidentiary hearing. However, OEA Rule 624.2 provides that an evidentiary hearing is within the Administrative Judge's discretion. The rule provides that

> *If* the Administrative Judge grants a request for an evidentiary hearing, *or makes his or her own determination that one is necessary*, the Administrative Judge will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed (emphasis added) . . . .

Thus, the AJ was within her authority to determine that a hearing was not required.

Moreover, the Superior Court in *Sheila Gill and Rhonda Robinson v. District of Columbia Office of Employee Appeals and District of Columbia Public Schools*, 2012 CA5844 and 5883 (MPA), p. 9 (D.C. Super. Ct. October 23, 2013)(citing *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), held that an AJ should hold a hearing if there are material issues in dispute. It went on to note that if an employee has been provided with one round of lateral competition and a written thirty-day notice, then an evidentiary hearing is not necessary. As explained below, an evidentiary hearing was not warranted in this matter because Agency did provide the requisite notice and one round of lateral competition was inapplicable. Furthermore, there were no material facts in dispute.

RIF Statute

OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter

> XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) establish the circumstances under which the OEA may hear RIFs on appeal.

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

As a result of the above-referenced statutes, this Office is authorized to review RIF cases where an employee claims an agency did not provide one round of lateral competition or where an employee was not given a thirty-day written notice prior to their separation.

Notice Requirements

The merits of the RIF notice requirements are not in dispute in this matter. Agency's notice was dated October 22, 2010. The effective date of the RIF was November 21, 2010.[9] Thus, Agency complied with the thirty-day notice statutory requirement.

[9] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* Tab # 1 (January 20, 2011).

Competitive Area

Agency provided in its approval of the RIF action that the competitive area was the Non-Public School Unit.[10] As provided in D.C. Official Code § 1-624.08(f), it was acceptable for Agency to establish a competitive area smaller that the entire agency. The Non-Public School Unit was a division within Agency, and therefore, it was a legitimate competitive area.

Competitive Level

As for the competitive levels within a competitive area, D.C. Official Code § 1-624.08(d) specifically addresses the requirements for competitive levels. It provides that employees are entitled to one round of lateral competition which shall be limited to positions in the employee's competitive level. Agency provided that there were a number of competitive levels that were eliminated. Employee was in the Placement Specialist competitive level.[11] According to an affidavit from Agency's Deputy Chief of Compliance for the Office of Special Education, all ten Placement Specialists positions were eliminated during the RIF action.[12]

As the AJ provided, OEA has consistently held that where an entire competitive level is eliminated, there is no one against whom an employee can compete.[13] Because the entire competitive level was abolished, D.C. Official Code § 1-624.08(d) is inapplicable in this matter. As a result, Agency did not need to conduct one round of lateral competition in this matter.

Agency Head

Employee argues in her Petition for Review, as she did on appeal, that Michelle Rhee was not the Agency head at the time of the RIF. However, there is evidence in the record to

[10] *Id.* at Tab # 2.
[11] *Id.*
[12] *District of Columbia Public Schools,* Tab # 2 (October 12, 2012).
[13] *Laura Smart v. D.C. Child and Family Services Agency,* OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014) ; *Jessica Edmond v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0344-10, p. 6 (November 6, 2012); and *Nicole Sivolella v. D.C. Public Schools,* OEA Matter No. 2401-0193-04, p. 3 (December 23, 2005).

support the AJ's determination that Michelle Rhee was the Agency head during Employee's RIF action. Agency provided Michelle Rhee's Personnel Action form which listed the effective date of her resignation as November 2, 2010. This document is signed by Crystal Jefferson, the Interim Deputy Chief of Human Resources. Moreover, Agency produced the signed copy of Michelle Rhee's written resignation which was addressed to then Mayor Adrian Fenty. This letter provides that her last day serving as Chancellor of Agency was November 1, 2010.[14] Therefore, contrary to Employee's claim, Michelle Rhee was authorized, as Agency head, to conduct the October 22, 2010 RIF action against him.

Budget Claims

Employee's final argument is that there were not legitimate budgetary constraints to warrant the RIF. The D.C. Court of Appeals held in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. *Anjuwan* also provided that OEA does not have jurisdiction to make any decisions pertaining to the shortage of funds that an agency may face. Consequently, OEA cannot second guess Agency's decision about a shortage of funds or its management decisions about which positions need to be abolished. The Court was clear in its ruling that OEA only has authority to determine if the RIF complied with the District RIF statutes and regulations.[15] Because Employee was properly RIFed in this matter, her Petition for Review must be denied.

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[14] *District of Columbia Public Schools' Brief,* Tabs # 1 and # 2 (March 28, 2013).

[15] *See also Valerie Jones, Gerald Whitmore,* and *Emmanuel L. Peaks v. Department of Mental Health,* OEA Matter Numbers 2401-0064-03, 2401-0065-03, 2401-0066-03, *Opinions and Orders on Petition for Review* (May 15, 2007); *Dushane Clark v. Department of Health,* OEA Matter No. 2401-0091-09, *Opinion and Order on Petition for Review* (December 12, 2011); and *Larry Battle, Jasper Burnette, Ralph Spencer, Brenda Fuller, and Jerry W. Lanum v. Department of Mental Health,* OEA Matter Nos. 2401-0076-03, 2401-0067-03, 2401-0077-03, 2401-0068-03, and 2401-0073-03, *Opinions and Order on Petition for Review* (May 23, 2008).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.